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No. 99-756

Supreme Court, U.S.
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In The

Supreme Court of the United States

JEFFREY H. MIMS, Trustee of the Estate of Coastal Plains, Inc., and INDUSTRIAL CLEARINGHOUSE, INC.,

Petitioners,

v.

BROWNING MANUFACTURING,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED RESTATED

Pursuant to Sup. Ct. R. 24(a), Respondent Browning Manufacturing ("Browning") restates the issues raised in the Petition as follows:

1. Given that there is no circuit conflict, should this Court review the application of judicial estoppel to claims that a corporate debtor failed to disclose as required by § 521(1) of the Bankruptcy Code, 11 U.S.C. § 521(1)?

2. Should this Court review the application of judicial estoppel to the undisclosed claims of a corporate debtor that are being asserted by a purchaser of those claims, where the purchaser is a corporation created by the principals of the debtor corporation that concealed those claims?

3. Should this Court review the application of judicial estoppel to undisclosed claims asserted by a bankruptcy trustee who – despite knowing that judicial estoppel might bar recovery and despite having himself raised allegations of fraud involving the debtor's successor-in-interest asserting the debtor's claims – nevertheless gave up 85% of the estate's claims to the company formed by the very person who had concealed those claims, and obtained in return only the right to 15% of any eventual recovery?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption. Respondent Browning Manufacturing is a Division of Emerson Power Transmission Corporation, which is a wholly owned subsidiary of EECO, Inc., which, in turn, is a wholly owned subsidiary of Emerson Electric Co. Browning Manufacturing was formerly a division of Emerson Electric Co.

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BRIEF IN OPPOSITION

Respondent Browning Manufacturing ("Browning") respectfully files this Brief in Opposition to the Petition for Writ of Certiorari filed by Plaintiffs Industrial Clearinghouse, Inc. ("ICHI") and Jeffrey H. Mims, the Trustee of the Bankruptcy Estate of Coastal Plains, Inc. ("the trustee"). (ICHI and the trustee are collectively referred to as "Plaintiffs.")

STATEMENT OF THE CASE

A. Nature of the Case

This commercial dispute involves an adversary proceeding ancillary to the bankruptcy of Coastal Plains, Inc. ("Coastal"). The Fifth Circuit held that, under the circumstances of this case, judicial estoppel applied to causes of action not disclosed by Coastal on its bankruptcy schedules as required by § 521(1) of the Bankruptcy Code. 11 U.S.C. § 521(1). Contrary to the suggestion of the Petition, there is no circuit split on that issue. Every circuit to consider the issue has concluded that judicial estoppel can (and, under appropriate circumstances, should) apply where a debtor fails to disclose claims as required by bankruptcy law. *See* 15, *infra.* The Fifth Circuit merely applied judicial estoppel as it has routinely been applied by numerous circuit, district, bankruptcy, and state courts. *See* 15, 21 n.4, *infra.*

This case certainly does not present the issue whether the entire doctrine of judicial estoppel should be abolished across the board in federal cases. *Plaintiffs have never before made that argument in the more than six years since Browning first raised judicial estoppel,* and should not be heard to make that argument now. *See* 12, *infra.* Nor did Plaintiffs argue below that application of judicial estoppel would be inconsistent with § 554 or any other

section of the Bankruptcy Code (an argument that is, in any event, without merit). *See* 13, *infra*.

Another issue not presented by this case is whether judicial estoppel should be applied with respect to claims of a debtor that are being asserted by an innocent third-party purchaser or by an unsuspecting bankruptcy trustee. It is undisputed in this case that the purchaser of the debtor's claims was a corporation (ICHI) formed by the principals of the debtor corporation (Coastal) that had concealed those claims on its bankruptcy schedules. As for the trustee, he is only entitled to 15% of any recovery pursuant to a deal that he made with ICHI, despite knowing that the claims being asserted by ICHI were subject to a judicial estoppel defense and despite having himself raised allegations of fraud involving ICHI. *See* 10-11, 26-27, *infra*. In any event, it is hornbook law that a bankruptcy trustee is subject to the same defenses (such as judicial estoppel) that could have been asserted against the debtor. *See* 22-24, *infra*.

While the Fifth Circuit decided this case based on judicial estoppel, Browning also urged a number of other arguments in support of reversal, including an argument that the district court's judgment had to be reversed based on the absence of evidence satisfying Texas causation standards. There was simply no evidence to support Plaintiffs' theory that, although Coastal admittedly was on the brink of bankruptcy before any of Browning's alleged wrongful conduct, prosperity was just around the corner and Coastal would have blossomed into a successful company but for Browning's brief delay in delivering certain inventory to Coastal for which Coastal had never paid Browning in the first place. Thus, the district court's judgment would have had to be reversed as a result of the absence of legally sufficient causation evidence (as well as a result of other errors) regardless of the Fifth Circuit's judicial estoppel ruling. *See* 28-29, *infra*.

B. Statement of Facts[1]

1. Coastal Was Headed for Bankruptcy Before the Events That Formed the Basis for Plaintiffs' Claims Against Browning.

Coastal, an equipment distributor, was purchased by Bill Young in August 1984 using leveraged buyout techniques (*i.e.*, using the assets of the acquired company to generate funds to pay the previous owner). Pet. App. 3; 18-V53:66-7. At the time of the purchase, Coastal was already losing money. 18-V52:20, 78.

After being acquired by Young, Coastal continued to have serious financial problems and was cut off by a number of major suppliers. DX-233, DX-246, DX-310; 18-V53:85-90, 99-103, 126-27; DX-282. By mid-1985, Coastal's cash flow problems had reached the point that Coastal was unable to pay its debts as they came due. 18-V52:113-14; 18-V53:106-11. A number of suppliers took or threatened to take legal action against Coastal based on its failure to pay for goods sold to Coastal. 18-V53:83-85, 101-03, 110-11, 130-31; 18-V57:212; DX-234, DX-239, DX-311, DX-305. Coastal also fell behind on office and equipment rental payments. 18-V53:131-35; DX-315. Coastal's problems were worsened by the loss of a major customer at the end of 1985 as a result of "deterioration of service" from Coastal. DX-307; 18-V56:131-32.

Coastal even failed to pay its payroll taxes, resulting in personal liability of $225,000 for Young. 18-V53:136-37. Indeed, Coastal's own auditors felt compelled to include in their audit for the year ending August 31, 1985, a statement that the company might be "unable to continue as a going concern," *i.e.*, that it might go out of business.

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[1] Browning is including this Statement of Facts in its Brief to correct omissions and inaccuracies in the Petition. Because Plaintiffs prevailed at the trial court level, Browning's Statement of Facts is based on matters that are undisputed in the record.

18-V53:104-10; DX-386. Faced with that prospect, Coastal's Bill Young and Wayne Duke began meeting with bankruptcy counsel in late 1985 or early 1986. 18-V57:68-71, 114; 18-V54:37.

2. Coastal Proposed a Workout Plan That Amounted to a Ransom Demand for Unpaid-for Inventory Held Hostage by Coastal.

In January 1986, Coastal sent letters to its creditors acknowledging its "cash flow problem" and threatening bankruptcy if the creditors did not agree to Coastal's workout plan. Pet. App. 4; DX-26, DX-27; 18-V53:111-13, 118. In those letters, Coastal asked its creditors to accept the return of inventory previously sold to Coastal on credit under a plan which would have required those creditors to pay Coastal 50% of the cost of *their own inventory* and write off Coastal's indebtedness to them in order to get *their own inventory* back – even though Coastal had never paid for that inventory. Pet. App. 4; DX-27. The cash paid to Coastal by the creditors would, in turn, have been paid to Coastal's secured lender Westinghouse. Pet. App. 4. The letters concluded with a threat of bankruptcy if the proposal was not accepted by Coastal's creditors. DX-26, DX-27; 18-V53:118.

Coastal's "offer" amounted to a ransom demand for unpaid-for inventory held hostage by Coastal. In the event of a Coastal bankruptcy, Coastal's secured lender Westinghouse would take priority over the suppliers (like Browning) that had furnished goods to Coastal on credit, but had not been paid. Thus, Coastal's suppliers faced the dilemma of either (1) paying half the cost of their own unpaid-for inventory in order to retrieve that inventory or (2) risking the loss of all their unpaid-for inventory to Coastal's secured lender Westinghouse in bankruptcy.

Many of Coastal's creditors rejected Coastal's "offer." *See, e.g.*, DX-282, DX-313, DX-314; 18-V53:129-31. However, Browning (which was at risk of losing $1.3 million for inventory that it had delivered to Coastal, but for which it had never been paid) tried to work with Coastal. 18-V52:133-34; 18-V56:151-52; 18-V55:42. As a result, Browning and Coastal entered into the transactions that formed the basis for Coastal's subsequent claims against Browning. Pet. App. 4. Pursuant to those transactions, Coastal returned the Browning inventory that it had never paid for to Browning. 18-V56:185-87. Coastal contended that, under agreements reached by the parties, Browning had an obligation either to pay Coastal for the returned Browning inventory (for which Coastal had never paid Browning) or to send the unpaid-for Browning inventory back to Coastal. On April 14, 1986, Young demanded return of the inventory in question "as soon as practicable, but in no event later than April 20, 1986." Pet. App. 4; PX-37; 18-V54:30-32; 18-V55:93.

3. Beleaguered by Lawsuits and Unable to Pay Its Debts, Coastal Filed Bankruptcy.

On April 16, 1986 – a mere two days after Coastal had demanded return of the Browning inventory – Young signed a voluntary petition for chapter 11 bankruptcy on behalf of Coastal. Pet. App. 4-5; 18-V54:33, 44-45. The petition was filed with the bankruptcy court about a week later. 18-V54:44-45. By the time of its bankruptcy, Coastal was over $7.9 million in debt, had withheld checks for overdue payments totaling more than $6 million, and was approximately $225,000 behind on its payroll taxes. 18-V53:135-38; 18-V56:101.

The day after it filed bankruptcy, Coastal mailed its creditors a letter explaining that the bankruptcy had become necessary because the workout plan proposed by Coastal was not accepted by "all creditors" and because

various creditors had filed lawsuits against Coastal. Pet. App. 5; DX-38. No mention was made of Browning.

On April 28, 1986, Coastal filed the adversary proceeding that became this lawsuit, seeking, first and foremost, the return of the unpaid-for Browning inventory. Pet. App. 5; 18-V7(BK):30-71. Four days later, on May 2, 1986, the bankruptcy court held a hearing at which it ordered that the Browning inventory in question be returned to Coastal. Pet. App. 5; 18-V54:38. Browning promptly complied with the bankruptcy court's order and completed the return of the inventory by the end of May. Pet. App. 5; 18-V56:189-93.

4. Although Coastal's Wayne Duke Believed That Coastal's Claims Against Browning Were Still Worth Millions, Coastal Failed to Disclose Those Claims as Required by Bankruptcy Law.

Coastal's bankruptcy attorney testified that the "primary purpose" of the adversary proceeding filed by Coastal against Browning was to obtain "return of the inventory." Pet. App. 5; 18-V9(BK):254. After the bankruptcy court ordered the inventory returned to Coastal on May 2, 1986, Browning, Westinghouse, and Coastal's bankruptcy attorney all shared the belief that little remained to the adversary proceeding. 18-V[illegible]BK):176-77, 254-58, 390; 18-V10(BK):245-46.

Coastal's CEO Wayne Duke, however, believed that Coastal still had multi-million dollar claims against Browning. 18-V10(BK):195-99. Nevertheless, on June 6, 1986, Duke executed sworn bankruptcy schedules on behalf of Coastal that concealed the existence of Coastal's claims against Browning in violation of § 521 of the Bankruptcy Code, which requires a debtor to list on its bankruptcy schedules all its assets, including all claims and causes of action. 18-V10(BK):198-99; 18-

V12(BkDX-79):325, 439. The bankruptcy schedules filed by Coastal on June 6, 1986 failed to list Coastal's claims against Browning (which Coastal's Duke believed to be worth millions of dollars) and also listed Browning's claim against Coastal for unpaid-for inventory without categorizing that claim as contingent, disputed, or subject to setoff. Pet. App. 5-6; 18-V12(BkDX-79):325, 351, 439.

In addition, in September 1986, Duke authorized Coastal's bankruptcy attorney to execute a Stipulation of Facts that further concealed Coastal's claims. 18-V10(BK):42; 18-V9(BK):390; 18-V11(BkDX-18):91-101. Coastal executed the Stipulation in connection with a motion filed by Westinghouse (Coastal's sole secured creditor) asking the bankruptcy court to lift the automatic stay, so that Westinghouse could foreclose on and auction off Coastal's assets. The Stipulation included estimates of the kind and value of Coastal's assets and stated that the *value of Coastal's general intangibles was less than $20,000.* Pet. App. 49. Again, the claims against Browning (general intangibles) were not listed. Pet. App. 6.

Without the undisclosed claims against Browning, Coastal's liability to its only secured creditor, Westinghouse, exceeded the value of its assets. Thus, the Stipulation indicated that Westinghouse would be entitled to all of Coastal's assets, and there would be no surplus available for distribution to the unsecured creditors of the estate. The unsecured creditors, Browning among them, relied on the Stipulation in deciding to consent to the lifting of the automatic stay so that the foreclosure auction could go forward. Pet. App. 21-22, 49-50. Similarly, the Stipulation formed a basis for the bankruptcy court's decision to lift the stay and allow the foreclosure and auction to proceed. Pet. App. 50; 18-V11(BkDX-20):116-25. Since the auction disposed of the entire bankruptcy estate, the lifting of the stay was clearly *not* a minor matter as Plaintiffs suggest. Pet. 24-25.

While Plaintiffs assert that Coastal's failure to disclose its claims was inconsequential because everyone involved in the bankruptcy proceeding was aware of those claims, the Fifth Circuit correctly held that the "record contradicts that assertion." Pet. App. 21. Duke alone believed that a multi-million dollar claim existed. As the Fifth Circuit held, Coastal's "silence led Browning, the other creditors, and the bankruptcy court to believe that Coastal's claims against Browning were resolved in May 1986, when it returned the inventory." Pet. App. 22.

5. Plaintiffs Never Offered a Cogent Explanation for the Omission of Coastal's Claims.

Plaintiffs' explanations for why Coastal's $10 million claims were omitted from the bankruptcy schedules and Stipulation boiled down to indignant protests that there was never any intent to hide those claims, and that those claims somehow just slipped through the cracks. Coastal's own bankruptcy attorney admitted that the claims should have been included on Coastal's bankruptcy schedules. Pet. App. 28; 18-V9(BK):254-58, 260-62. When asked why the claims were omitted, he replied, "I can't tell you exactly why." 18-V9(BK):255-56.

Duke tried to blame Coastal's lawyers, but admitted that the lawyers had explained the bankruptcy forms to him and had told him what the various categories of items included. 18-V10(BK):200-05. In addition, he conceded that Coastal itself determined the values that should be listed on the schedules. 18-V10(BK):200-05. Neither Duke nor any other witness testified that Coastal's bankruptcy counsel advised Coastal *not* to disclose the claims. Pet. App. 29.

6. The Principals of the Bankrupt Coastal Formed a New Company (ICHI), Which Acquired Coastal's Assets at Bargain Rates and Continued in Business.

The auction of Coastal's assets that resulted from Coastal's execution of the Stipulation took place in October 1986. Once again, no mention of Coastal's claims against Browning was made in the foreclosure notice or in the advertisements for the auction or at the auction itself. Pet. App. 6; 18-V11(BkDX-22):129-38, 18-V11(BkDX-23):139-40; 18-V9(BK):390, 402-13; 18-V10(BK):245-46. Coastal's secured lender Westinghouse was the successful bidder at the auction and bought all Coastal's assets for $3.25 million by setting off the purchase price against Coastal's debt. Pet. App. 52; 18-V54:62; 18-V61:65-66; 18-V9(BK):392. The highest bid – that of Westinghouse – on Coastal's general intangibles (which included Coastal's undisclosed claims against Browning) was $2,000. Pet. App. 6.

After buying Coastal's assets at the auction, Westinghouse (which had been involved in ongoing negotiations with Coastal before the auction) turned around and sold those assets (including Coastal's undisclosed claims against Browning) to a new company formed by Coastal's principals called Industrial Clearinghouse, Inc. ("ICHI"). 18-V9(BK):323-24, 387-92; 18-V10(BK):54-55, 60-61, 152-57; 18-V61:29, 65-66. Upon the formation of ICHI, Duke, who had been the CEO of Coastal, became the CEO of ICHI. Pet. App. 7. In addition, all of Coastal's employees became ICHI employees. Pet. App. 7. As one employee of both Coastal and ICHI conceded concerning the relationship between the old Coastal and the new ICHI, "You showed up at the same office with the same people and the same inventory." 18-V54:196; *see* 18-V10(BK):73, 152-57.

Because ICHI had not paid anywhere near the true cost of the Coastal inventory, it was able to sell that inventory at discounted prices. 18-V54:196-98. Thus, the principals of Coastal were able to avoid paying the debts of that company by putting Coastal in bankruptcy, and yet managed to continue in business by having ICHI acquire, at bargain rates, Coastal's assets. Pet. App. 29-30. ICHI paid only $1.24 million for Coastal assets that it contended were worth almost $10 million – a purchase that Duke understandably described as "extremely favorable." 18-V10(BK):66-67, 71-73; 18-V12(BkDX-68):175-77. In addition, ICHI acquired Coastal's undisclosed claims against Browning without ever really having to pay for them. Although Duke had failed to include Coastal's claims against Browning in either Coastal's bankruptcy schedules or in the Stipulation, *Duke expressly insisted that those claims be specifically included among the bankruptcy assets sold by Westinghouse to ICHI.* Pet. App. 7; 18-V10(BK):54-55. As Coastal's Young put it, ICHI *"made one hell of a deal."* 18-V12(BkDX-54):62-63 (emphasis added); 18-V10(BK):188.

7. Nevertheless, Plaintiffs Pursued Claims Against Browning for Allegedly Bankrupting Coastal.

After ICHI acquired all Coastal's assets, ICHI filed an amended complaint alleging for the first time that Browning's conduct had destroyed Coastal. Pet. App. 7. In March of 1993, Browning filed a motion for summary judgment in district court (to which the adversary proceeding had been removed) seeking, among other things, the imposition of judicial estoppel against ICHI because of Coastal's failure to list the claims against Browning in its bankruptcy schedule of assets. 19-V25:4363-64, 4409-16.

On the eve of a May 1993 trial setting in district court, the bankruptcy trustee – who had twice attempted to close the estate as a no-asset case – intervened, contending that the bankruptcy estate owned the claims being pursued against Browning and raising allegations of fraudulent conduct involving Coastal and ICHI in connection with the concealment of the claims. Pet. App. 7-8; 19-V33:5351-52, 5356-57. The district court referred the matter back to the bankruptcy court to resolve which party owned the claims. Pet. App. 8.

In July of 1993, Browning filed a trial brief in the bankruptcy court that also prominently asserted judicial estoppel against ICHI. 18-V8(BK):28-35. As a result of Browning's briefs in district court and bankruptcy court, the trustee was on notice that ICHI's recovery against Browning might be barred by judicial estoppel. This should have come as no surprise since the trustee himself had pointed out the failure to disclose the claims and had raised allegations of fraudulent conduct. Pet. App. 7-8; 19-V33:5351-52, 5356-57.

Despite the trustee's fraud allegations involving Coastal and ICHI, the trustee and ICHI subsequently entered into a settlement agreement that gave ICHI (made up of Coastal's principals) ownership of all claims against Browning, and assigned only a 15% right of recovery to the trustee. Pet. App. 8; BKIV:520-38. The bankruptcy court approved the settlement and also ruled against Browning on its judicial estoppel defense, holding that judicial estoppel did not apply because the non-disclosure of Coastal's claims had been "inadvertent." BK1:484; 18-V12(BK):540-45.

The district court affirmed the bankruptcy court's ruling on judicial estoppel, and a trial took place in district court. An adverse verdict was returned against Browning, except that the jury found in Browning's favor on Plaintiffs' fraud claims. Browning appealed. The Fifth Circuit reversed and rendered judgment for Browning on

the ground that the bankruptcy court had misapplied the law of judicial estoppel, which, as a matter of law, barred Plaintiffs' claims as a result of Coastal's failure to disclose those claims. The Fifth Circuit emphasized that judicial estoppel was appropriate because of the need to discourage bankruptcy debtors from concealing claims, writing off debts, and later reaping windfalls by suing on the undisclosed claims. Pet. App. 30.

REASONS FOR DENYING THE WRIT

I. The Questions Presented in the Petition Were Not Preserved or Decided Below and Thus Have Been Waived.

This Court need not even consider the merits of Plaintiffs' Petition because the central arguments in that Petition were neither raised in nor addressed by the courts below. As a general rule, this Court will not decide arguments that were never raised or decided in the lower courts. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). There is no reason to deviate from that general rule here, and Plaintiffs have offered none. Indeed, Plaintiffs nowhere even tell this Court that their primary arguments concerning judicial estoppel are being raised for the first time ever in this Court.

The Petition in this case bears almost no resemblance to Plaintiffs' previous briefing. Prior to the Petition, Plaintiffs' main arguments against judicial estoppel were that the failure to disclose the claims was inadvertent and that Browning suffered no detrimental reliance. Plaintiffs have never before argued – as they do for the first time in this Court – that the doctrine of judicial estoppel should be entirely abolished. Moreover, Plaintiffs' new alternative argument that this Court should at least "give consistency to the doctrine" of judicial estoppel by eliminating alleged variations in the application of that doctrine is actually contrary to the position previously taken by

Plaintiffs. Pet. 18. Plaintiffs repeatedly told the Fifth Circuit that "hard and fast rules of judicial estoppel are not appropriate" for the equitable doctrine of judicial estoppel and that determinations concerning judicial estoppel "must depend upon the facts of the particular case" and "the equities of the entire situation." D. Br. 34; Pet. Reh. 6-7; Pet. Reh. En Banc 6.

Another new argument raised by Plaintiffs for the first time in their Petition is that the application of judicial estoppel would violate § 554 of the Bankruptcy Code. Nowhere in their briefing below did Plaintiffs cite § 554 or any other section of the Code as a reason for not applying judicial estoppel. Consequently, the Fifth Circuit did not address any such statutory arguments. In *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644-46 (1992), this Court held that a petitioner could not assert for the first time on certiorari an alternative statutory basis in the Bankruptcy Code for enlarging the bankruptcy estate. That is exactly what Plaintiffs are improperly attempting to do here.

As for Plaintiffs' argument that judicial estoppel should not be applied to a bankruptcy trustee, that argument was not urged in Plaintiffs' Fifth Circuit briefs, but rather was raised for the first time in Plaintiffs' motions for rehearing. Thus, that argument also has been waived. *See Moore v. El Paso County, Texas*, 660 F.2d 586, 590 n.4 (5th Cir. 1981).

Because the issues asserted by Plaintiffs in their Petition were not raised, explored, or developed below, and because the Fifth Circuit never had an opportunity to address those issues, certiorari should be denied.

II. There Is No Circuit Conflict on the Real Issue Raised by This Case.

Plaintiffs devote almost their whole Petition to arguments that this Court should take this "unique opportunity" to abolish the entire doctrine of judicial estoppel or at least to drastically overhaul that doctrine – arguments that were never made to the courts below. Pet.

App. 10. The general questions of whether judicial estoppel should be eliminated from federal jurisprudence, or at a minimum substantially revamped, are not presented by this case, and are far too broad and abstract to constitute appropriate issues for this Court's review. On the issue that this case *does* raise and that the Fifth Circuit did decide – whether judicial estoppel can apply as a result of a debtor's failure to disclose a claim as required by federal bankruptcy law – there is no circuit conflict. Every circuit to consider that issue has concluded that judicial estoppel can apply under such circumstances.

A. An Abstract Question Concerning the Viability of Judicial Estoppel as a Legal Doctrine Does Not Present a Case or Controversy.

In an attempt to manufacture a conflict among the circuits, Plaintiffs cast their nets extremely broadly, and present as the primary issue in their Petition an abstract question concerning the existence and application of judicial estoppel generally in federal jurisprudence. Federal courts, however, are prohibited by the case-or-controversy requirement from deciding "abstract, hypothetical or contingent questions." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945).

Plaintiffs' first Question Presented concerning whether the doctrine of judicial estoppel should be abolished is exactly the kind of question that this Court has rejected as too generalized and amorphous. In *United States v. Fruehauf*, 365 U.S. 146, 157 (1961), this Court explained that it has "consistently refused to give" advisory opinions or "advance expressions of legal judgment upon issues which remain unfocused because they are not . . . precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests. . . . " While theoretical and esoteric

questions regarding the general existence and bounds of judicial estoppel may be an appropriate subject matter for treatises and law review articles, the broad issues raised by Plaintiffs are not sufficiently focused for certiorari review.

B. No Circuit Conflict Exists on the Real Issue Here – Whether Judicial Estoppel Can Apply Where a Debtor Has Failed to Disclose Claims.

Perhaps Plaintiffs framed their question so broadly because there is clearly no circuit conflict on the real issue presented by this case. Section 521(1) of the Bankruptcy Code plainly requires a debtor to disclose all assets, including any contingent or unliquidated claims. 11 U.S.C. § 521(1). Both the First and Third Circuits – the only other circuits to consider the issue – have held, like the Fifth Circuit, that where a debtor has failed to disclose a cause of action as required by § 521(1), judicial estoppel may apply. *See* 11 U.S.C. § 521(1); *Payless Wholesale Distrib., Inc. v. Alberto Culver (P.R.), Inc.*, 989 F.2d 570 (1st Cir.), *cert. denied*, 510 U.S. 931 (1993); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3d Cir.), *cert. denied*, 488 U.S. 967 (1988).

The Petition in this case creates the erroneous impression that the Tenth and D.C. Circuits have held that judicial estoppel does not apply to the failure to disclose claims in bankruptcy schedules and stipulations. Pet. 11, 13. Thus, Plaintiffs tell this Court that "the Tenth and D.C. Circuits would not have applied judicial estoppel at all had this appeal arisen in one of those Circuits." Pet. 13. The truth is that neither of those circuits has addressed the applicability of judicial estoppel to the failure to disclose a claim as required by bankruptcy law. Therefore, it is impossible to know how those courts would resolve the issues presented in this case. A debtor's clear duty to list claims and causes of action on

bankruptcy schedules, combined with the strong policy interests in full disclosure of a debtor's assets, could well lead the Tenth and D.C. Circuits to apply judicial estoppel in a context similar to this case, even if those courts have rejected the doctrine of judicial estoppel in other contexts.

Plaintiffs also tell this Court that the "Tenth Circuit declined to apply judicial estoppel in the bankruptcy context in *Golfland Entertainment Centers, Inc. v. Peak Investment, Inc. (In re BCD Corp.)*, 119 F.3d 852, 858 (10th Cir. 1997)." Pet. 11. However, Plaintiffs neglect to mention that *Golfland* did not involve the nondisclosure of bankruptcy assets or claims, and did not discuss the specific statutory duty of a bankruptcy debtor to identify all its claims and assets. Rather, *Golfland* concerned the ordinary application of general judicial estoppel principles regarding inconsistent positions taken in judicial proceedings. While *Golfland* arose in the context of a bankruptcy proceeding, it has nothing whatsoever to do with the issues involved in this case.

In order to present a conflict justifying certiorari review, Plaintiffs must demonstrate "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). Plaintiffs have failed to carry that burden here. The Fifth Circuit's decision involves the application of judicial estoppel to a claim omitted from a debtor's bankruptcy schedules. On the other hand, the Tenth and D.C. Circuit cases cited by Plaintiffs involve only the general application of judicial estoppel unrelated to the bankruptcy issues presented by this case. There is no conflict among the circuits as to the real issue here.

C. Nor Is There Any Circuit Conflict as to the Nuances of How Judicial Estoppel Should Be Applied.

Nor is there any circuit conflict as to any issue raised by this case with respect to the nuances of how judicial estoppel should be applied. As an initial matter, most of the alleged conflicts posed by Plaintiffs relate to how judicial estoppel should be applied in the abstract, not in the context of claims omitted from a debtor's bankruptcy schedules, and thus are not even arguably conflicts raised by this case. *See* Pet. 20-26.

The issue whether judicial estoppel requires detrimental reliance raises no circuit conflict under the present facts. Pet. 24. Neither of the cases on which Plaintiffs rely (*Young v. United States Dep't of Justice*, 882 F.2d 633 (2d Cir. 1989), and *Jackson Jordan, Inc. v. Plasser Am. Corp.*, 747 F.2d 1567 (Fed. Cir. 1984)) involved omitted bankruptcy claims. Moreover, recognizing that some courts require reliance, the Fifth Circuit expressly found that Browning had detrimentally relied. Pet. App. 23 n.8.

There is also no circuit conflict on the issue of whether judicial acceptance is required for the application of judicial estoppel to claims omitted from bankruptcy schedules. Pet. 24-26. Here, the Fifth Circuit held that judicial acceptance is required, and that the requirement was satisfied by the bankruptcy court's decision to permit the foreclosure on Coastal's assets based on the concealment of Coastal's claims. In their attempt to create a conflict with respect to judicial acceptance, Plaintiffs once again rely primarily on cases that have nothing to do with the specific bankruptcy issues involved here. Although *Ryan Operations, G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996), did involve the omission of a bankruptcy claim, the Third Circuit merely observed that judicial acceptance was a "relevant" consideration

rather than an "independent requirement" – an observation that hardly makes for the stuff of conflicts review. *Id.* at 361.[2]

Likewise, no circuit conflict exists on what parties are subject to judicial estoppel. Pet. 23-24. Plaintiffs were unable to locate any circuit court cases holding that a trustee is not subject to judicial estoppel. Instead, they attempt to rely on one district court case that has nothing to do with omitted bankruptcy claims (*In re Payroll Express Corp.*, 921 F. Supp. 1121 (S.D.N.Y. 1996)), and one district court case that is unpublished (*Deloach v. Provident Health Services, Inc.*, No. CV493-120, 1993 WL 850445 (S.D. Ga. Sept. 1, 1993)). *See* 25 n.6, *infra*. As for Plaintiffs' out-of-context quotation from *Matter of Cassidy*, 892 F.2d 637 (7th Cir. 1990), suggesting that judicial estoppel only applies to certain kinds of parties, it is grossly misleading. *Cassidy* did not involve the issue of what parties are subject to judicial estoppel, and certainly did not involve that issue in the context of claims concealed by a bankruptcy debtor.

Finally, there is no circuit conflict occasioned by nuances in the Fifth Circuit's discussion of intent and inadvertence. Pet. 20-23. Plaintiffs urge that the Third Circuit's decision in *Ryan* conflicts with the Fifth Circuit's analysis of inadvertence in this case. However, in holding that Coastal's omission could not have been inadvertent as a matter of law, the Fifth Circuit actually *relied* on *Ryan*

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[2] Moreover, in connection with their judicial acceptance argument, Plaintiffs mischaracterize the Seventh Circuit's cases as requiring judicial acceptance in the form of a judgment. *See* Pet. 25. In *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540 (7th Cir. 1990), and *Matter of Cassidy*, 892 F.2d 637 (7th Cir. 1990), the Seventh Circuit merely held that a party must prevail only on an underlying substantive issue or fact in order to be subsequently bound by judicial estoppel – a standard that is plainly met here.

and other Third Circuit precedent. Indeed, *Ryan* itself provided the no "motive to conceal" factor adopted by the Fifth Circuit.[3] *Ryan*, 81 F.3d at 363 (distinguishing *Oneida* on the ground that in that case the debtor had a "motive to conceal" and indicating that a debtor who would only receive 9% of any recovery had no appreciable motive to conceal). *Ryan* did not hold that a debtor's intent in omitting a potential cause of action as a bankruptcy asset could never be inferred. Rather, it held only that such intent could not be inferred *"solely* from nondisclosure" on bankruptcy schedules. *Id.* at 365 (emphasis added); *see In re Okan's Foods, Inc.*, 217 B.R. 739, 755 (Bankr. E.D. Pa. 1998) (holding that, under *Ryan*, bad faith could be inferred from factors other than mere nondisclosure). The *Ryan* decision does not conflict with the Fifth Circuit's analysis in this case, especially in light of Duke's obvious motive to conceal.

D. The Distinguishable Maryland State Court Case Relied on by Plaintiffs Does Not Create a Conflict Warranting Review by this Court.

The absence of a real circuit conflict is demonstrated by Plaintiffs' need to rely on an alleged conflict between the Fifth Circuit's decision here and the decision of the

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[3] The Fifth Circuit stated, "Our review of the jurisprudence convinces us that, in considering judicial estoppel *for bankruptcy cases*, the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment." Pet. App. 24. Contrary to Plaintiffs' contention, that statement about the requirements for inadvertence "in general" does not give rise to an irrebuttable presumption and leaves room for discretion in determining when a debtor has a motive for concealment (unless, as here, the evidence establishes motive to conceal as a matter of law).

Maryland Court of Appeals in *Winmark Limited Partnership v. Miles & Stockbridge*, 693 A.2d 824 (Md. 1997). However, *Winmark* is both distinguishable and not significant enough to create a conflict meriting this Court's review.

The *Winmark* court's refusal to apply judicial estoppel to a claim omitted from a bankruptcy schedule was based on that court's concern for the rights of creditors. *Id.* at 826, 829. In that case, permitting the prosecution of the undisclosed claims would have inured entirely to the creditors' benefit. *Id.* Here, by contrast, only 15% of any recovery was to be paid to the bankruptcy trustee, and that amount would be further reduced by payment of the trustee's fees and other administrative expenses under § 503 of the Bankruptcy Code. *Compare Oneida*, 848 F.2d at 417, 420 (where only one-third of any recovery would be available to creditors, judicial estoppel applied to bar claims) *with Ryan*, 81 F.3d at 363 (where 91% of any recovery would be available to creditors, judicial estoppel did not apply to bar claims).

Winmark is also distinguishable because the Maryland court in that case stressed that the parties against whom the claim was being asserted "were not creditors in the bankruptcy," and thus had not participated to their detriment in the reorganization process. *Winmark*, 693 A.2d at 825. Here, on the other hand, Browning was Coastal's largest unsecured creditor. Based on Coastal's nondisclosure of its claims in its bankruptcy schedules and in the Stipulation, Browning withdrew its objection to the lifting of the stay, which allowed all of Coastal's assets to be foreclosed upon and ultimately sold to Coastal's successor ICHI. Had Browning and the other creditors known of the undisclosed claims, their response to Coastal's motion to lift stay and their bidding at the foreclosure auction undoubtedly would have been different. Pet. App. 29.

In any event, even if *Winmark* could be viewed as in tension with the Fifth Circuit's opinion in this case, it certainly does not create a conflict warranting this Court's review. As noted above, all the circuit courts to consider the issue have agreed that judicial estoppel can, and in appropriate circumstances should, apply to a debtor's undisclosed claim. *See* 15, *supra*. In addition, numerous other federal and state courts have likewise applied judicial estoppel to omitted claims.[4] Against this backdrop of extensive authority favoring the application of judicial estoppel to claims omitted by a bankruptcy debtor, a distinguishable decision from the Maryland

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[4] FEDERAL CASES: *E.g., Chandler v. Samford Univ.*, 35 F. Supp. 2d 861, 864 (N.D. Ala. 1999); *Kunica v. St. Jean Financial, Inc.*, 233 B.R. 46, 57-59 (S.D.N.Y. 1999), *aff'd*, 63 F. Supp. 2d 342 (S.D.N.Y. 1999); *In re Tippins*, 221 B.R. 11, 26 (Bankr. E.D. Ala. 1998); *In re Okan's Foods, Inc.*, 217 B.R. 739, 754-756 (Bankr. E.D. Pa. 1998); *Youngblood Group v. Lufkin Federal Savings & Loan Ass'n*, 932 F. Supp. 859, 868 (E.D. Tex. 1996); *Rosenshein v. Kleban*, 918 F. Supp. 98, 104 (S.D.N.Y. 1996); *In re Fineberg*, 202 B.R. 206, 227-228 (Bankr. E.D. Pa. 1996); *Welsh v. Quabbin Timber, Inc.*, 199 B.R. 224, 229 (D. Mass. 1996); *In re Freedom Ford, Inc.*, 140 B.R. 585, 587 (Bankr. M.D. Fla. 1992); *In re H.R.P. Auto Center, Inc.*, 130 B.R. 247, 254 (Bankr. N.D. Ohio 1991); *In re Little*, 126 B.R. 861, 868 (Bankr. N.D. Miss. 1991); *Pako Corp. v. Citytrust*, 109 B.R. 368, 376-377 (D. Minn. 1989); *In re Louden*, 106 B.R. 109, 112 (Bankr. E.D. Ky. 1989); *In re Hoffman*, 99 B.R. 929, 934 (N.D. Iowa 1989); *In re Galerie Des Monnaies of Geneva, Ltd.*, 55 B.R. 253, 259-260 (Bankr. S.D.N.Y. 1985), *aff'd*, 62 B.R. 224 (S.D.N.Y. 1986).

STATE CASES: *E.g., Int'l Engine Parts, Inc. v. Feddersen & Co.*, 64 Cal. App. 4th 345, 75 Cal. Rptr. 2d 178 (1998); *Conrad v. Bank of America*, 45 Cal. App. 4th 133, 137-38, 53 Cal. Rptr. 2d 336 (1996); *Cafferty v. Thompson*, 223 A.D.2d 99, 644 N.Y.S.2d 584 (1996); *Southmark Corp. v. Trotter, Smith & Jacobs*, 442 S.E.2d 265 (Ga. App. 1994); *Luna v. Dominion Bank of Middle Tennessee, Inc.*, 631 So. 2d 917 (Ala. 1993); *Caplener v. United States Nat'l Bank of Oregon*, 857 P.2d 830 (Or. 1993); *Zwemer v. Product Credit Ass'n of Midlands*, 792 P.2d 245 (Wyo. 1990).

Court of Appeals certainly does not justify a conflicts review by this Court.

III. Given That There Is No Circuit Conflict, the Applicability of Judicial Estoppel to a Claim Omitted From a Bankruptcy Schedule Does Not Raise a Significant Issue Worthy of Certiorari Review.

A. The Fifth Circuit Properly Applied Judicial Estoppel to a Claim Omitted by a Bankruptcy Debtor.

Plaintiffs argue for the first time in their Petition that the Fifth Circuit's decision to judicially estop a bankruptcy trustee from recovering on an undisclosed cause of action violates § 554 of the Bankruptcy Code. That section sets forth the procedures for abandoning estate property and provides that unabandoned property remains property of the estate. 11 U.S.C. § 554. Pet. 5. Contrary to Plaintiffs' new argument, the Fifth Circuit's decision does not disturb settled law. It is a long-standing principle of bankruptcy law that, when a debtor fails to list a cause of action as an asset on its bankruptcy schedules, judicial estoppel applies to bar prosecution of the undisclosed claim. *See* 15, 21 n.4, *supra.* Plaintiffs' observation that an undisclosed claim remains property of the bankruptcy estate unless abandoned under § 554 misses the point because claims asserted by a bankruptcy trustee are subject to all defenses (such as judicial estoppel) that could have been asserted against the debtor. *See Bank of Marin v. England,* 385 U.S. 81, 87 (1966) and authorities cited at 24 n.5, *infra.*

Nor is the application of judicial estoppel inconsistent with § 704 of the Bankruptcy Code, which instructs the trustee to "collect and reduce to money the property of the estate . . . as expeditiously as is compatible with the best interests of the parties in interest. . . . " Section 704 is

simply an enabling statute that in no way enlarges the trustee's rights to take actions beyond the rights previously possessed by the debtor. *See Integrated Solutions, Inc. v. Service Support Specialities*, 124 F.3d 487, 494 (3d Cir. 1997). Thus, there is no conflict between § 704 and legal principles (such as judicial estoppel) that have the effect of limiting recovery by, on behalf of, or as successor to a bankruptcy estate. *See id.*

The wide acceptance of the application of judicial estoppel to claims omitted from bankruptcy schedules arises from the vital importance of full disclosure of all known assets of the debtor on such schedules. As the Fifth Circuit explained in this case, the "integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets." Pet. App. 18, quoting *Rosenshein v. Kleban*, 918 F. Supp. 98, 104 (S.D.N.Y. 1996). Complete disclosure is crucial so that creditors can make informed decisions and so that the bankruptcy system can function effectively. *See Ryan*, 81 F.3d at 362. When a debtor seeks the benefits of bankruptcy relief, it must satisfy its statutory duty of candidly disclosing its assets, including any claims or causes of action that the debtor may possess. *See In re Mahan*, 104 B.R. 300, 302 (Bankr. E.D. Cal. 1989). Failure to disclose known claims as required by bankruptcy law consistently results in application of judicial estoppel with respect to those claims. *See* 15, 21 n.4, *supra*.

B. Judicial Estoppel Applies to Undisclosed Claims Pursued by the Bankruptcy Trustee or Other Parties in Privity with the Debtor.

Nor can judicial estoppel be avoided by having a claim pursued by the bankruptcy trustee instead of by the debtor itself. As this Court has long recognized, a bankruptcy trustee succeeds to only such rights as the debtor possessed, and the trustee is subject to all defenses that

could have been asserted against the debtor. *See Bank of Marin v. England*, 385 U.S. 81 (1966); *Vartman v. First Nat'l Bank of Waterloo*, 216 U.S. 134, 138 (1910).[5]

Accordingly, even if an undisclosed claim remains property of the estate subject to the claims of creditors, judicial estoppel not only bars recovery by a debtor acting on its own behalf, but also bars recovery by a trustee or any other party who succeeds to the rights of the debtor. *See In re Fineberg*, 202 B.R. 206, 227-28 (Bankr. E.D. Pa. 1996) (claims not disclosed by a debtor may be subject to judicial estoppel even when the claims are asserted by a bankruptcy trustee); *Kunica v. St. Jean Financial, Inc.*, 233 B.R. 46, 57-59 (S.D.N.Y. 1999), *aff'd*, 63 F. Supp. 2d 342 (S.D.N.Y. 1999) (assignee of debtor having same president as debtor was judicially estopped from asserting claims omitted from bankruptcy schedules by the debtor); *In re Charter Executive Center Ltd.*, 34 B.R. 131, 134 (Bankr. M.D.

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[5] The Senate and House Reports also reflect that a trustee or successor can "take no greater rights than the debtor himself had." H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-68 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82-83 (1978). When Congress wanted a trustee not to be subject to the same defenses as the debtor, it clearly knew how to so provide as reflected in its enactment of a special statute of limitations rule for trustees in § 108(a) of the Bankruptcy Code. Had Congress intended to exempt the trustee from the ordinary operation of judicial estoppel, it would have done so via a Code provision similar to § 108(a). *See also* the following circuit cases holding that a trustee can take no greater rights than the debtor itself had: *Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996); *Stumpf v. Albracht*, 982 F.2d 275, 277 (8th Cir. 1992); *Matter of Sanders*, 969 F.2d 591, 593 (7th Cir. 1992); *In re Schauer*, 835 F.2d 1222, 1224 (8th Cir. 1987); *Angeles Real Estate Co. v. Kerxton*, 737 F.2d 416, 418-19 (4th Cir. 1984); *Wyle v. R.J. Reynolds Ind., Inc.*, 709 F.2d 585, 592 (9th Cir. 1983); *South Central Livestock Dealers, Inc. v. Security State Bank of Hedley, Texas*, 614 F.2d 1056, 1061 (5th Cir. 1980); *In re Easy Living, Inc.*, 407 F.2d 142, 144 (6th Cir. 1969).

Fla. 1983) (the assignee of a debtor's property interest is subject to any defense the obligor had against the assignor).

Judicial estoppel applies to undisclosed claims even where the effect is to reduce or eliminate recovery by unpaid creditors. *See Oneida*, 848 F.2d at 420; *Pako Corp. v. Citytrust*, 109 B.R. 368, 376 (D. Minn. 1989). The policy interests in full disclosure and finality simply outweigh the creditors' competing interests in payment – especially where, as here, the creditors would only receive a small fraction of any recovery, and the debtor or its successors would reap the benefits of the nondisclosure. *See id.* As a result, ICHI and the bankruptcy trustee cannot avoid judicial estoppel by pointing to their status as a successor to the debtor or as a trustee of the bankruptcy estate.[6]

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[6] Plaintiffs cite two district court cases for the proposition that judicial estoppel should not be applied to a bankruptcy trustee. Pet. 23, citing *In re Payroll Express Corp.*, 921 F. Supp. 1121 (S.D.N.Y. 1996), and *Deloach v. Provident Health Services, Inc.*, 1993 WL 850445 (S.D. Ga. 1993). *Payroll* did not involve the failure to disclose a claim. Moreover, although *Payroll* was not itself an action involving a trustee's special avoidance powers (such as the power to avoid or set aside preferences), *Payroll* relied exclusively on cases that did involve a trustee's special avoidance powers, and thus *Payroll* incorrectly applied avoidance concepts in a nonavoidance context. *See Sender v. Simon*, 84 F.3d at 1304 (distinguishing between avoidance actions and successor actions pursued by a trustee); *In re Ostrom-Martin, Inc.*, 188 B.R. 245, 251 (Bankr. C.D. Ill. 1995) (only when a trustee exercises his avoidance powers does he acquire rights greater than those possessed by the debtor itself). As for *Deloach*, it is an unpublished district court decision that cites *no* authority for its conclusion. The *Deloach* court's lack of understanding of the issues is reflected by the fact that it did not realize that a chapter 11 debtor in possession itself assumes all the rights, powers, functions and duties of a bankruptcy trustee. *See* 11 U.S.C. § 1107(a). *Deloach* is an aberration inconsistent

C. In Any Event, This Case Is Not an Appropriate Vehicle for Considering Whether Judicial Estoppel Should Be Applied to an Innocent Third-Party Purchaser or an Unsuspecting Trustee.

Perhaps the most troubling aspect of Plaintiffs' Petition is its attempt to cast this case as presenting the issue of whether judicial estoppel should be applied to the claims of an innocent third-party purchaser or of an unsuspecting trustee. Here, it is undisputed that 85% of any recovery was to go to the corporation formed by the principals of the debtor that failed to disclose its claims as required by bankruptcy law. As a result, any recovery would end up in the pockets of the very person (Wayne Duke) who initially concealed the claims in bankruptcy court and later bragged about having made an "extremely favorable" bargain in purchasing the claims for a fraction of their believed value. This case in no way involves innocent third-party purchasers.

As for the bankruptcy trustee in this case, he voluntarily surrendered ownership of 100% of Coastal's claims to ICHI in exchange for an assignment of only 15% of any recovery, which would be further reduced after payment of trustee fees and other administrative expenses as required by the Bankruptcy Code. 11 U.S.C. § 503. It would be nonsensical to allow those responsible for the concealment of the claims to profit to the tune of 85% of any recovery just so that the trustee could recover 15%, less administrative fees and expenses.

Moreover, at the time the trustee chose to settle with ICHI, the trustee was fully aware of the debtor's alleged fraudulent conduct, the nondisclosure of the claims, and Browning's assertion of judicial estoppel. *See* 10-11, *supra*.

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with the mainstream view that judicial estoppel can bar omitted claims. *See* 15, 21 n.4, *supra*.

Nevertheless, the trustee decided to enter a settlement agreement with ICHI that compromised the trustee's claims and made recovery hinge on ICHI's success in litigating against Browning.

In applying judicial estoppel to the concealed claims, the Fifth Circuit relied on the policy of full disclosure and the interests of the bankruptcy system as a whole. If debtors or their successors were permitted to reap the benefits of their concealment and hold trustees hostage by dangling before them a small percentage of any recovery, then the interests of full disclosure would be thwarted, and the bankruptcy system as a whole would be jeopardized.

Judicial estoppel exists to protect the integrity of the judicial system. Pet. App. 11-12. At some point, courts have the right to declare that they will not allow the judicial system to be used as a vehicle for unconscionable results arising from a shameless switching of positions in the litigation process. That point was reached and surpassed here. Plaintiffs were attempting to accomplish the very thing that judicial estoppel is designed to prevent: "conceal [their] claims; get rid of [their] creditors on the cheap; and start over with a bundle of rights." *Payless*, 989 F.2d at 571. Although Coastal's Duke bragged about having made an "extremely favorable" deal and Young crowed about having made "one hell of a deal," it was a deal that contravened the principles of judicial estoppel as the Fifth Circuit correctly held. Indeed, if ever a case demonstrated why judicial estoppel should *not* be abolished, this is the case.

IV. Defects in Plaintiffs' Causation Proof Under Texas State Law Independently Support the Judgment of the Fifth Circuit.

As a prevailing party, Browning is entitled to urge any ground for affirmance that would support the judgment below, whether or not the court below relied on or considered that ground. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984). Even if Plaintiffs were not judicially estopped from asserting their claims as the Fifth Circuit held, the Fifth Circuit's decision reversing the judgment in favor of Plaintiffs was still correct because, among other reasons, Plaintiffs' causation proof was legally insufficient under Texas state law.

The linchpin of Plaintiffs' causation theory was that Coastal was forced to file bankruptcy because of Browning's brief delay in returning to Coastal certain inventory that Browning had previously sold to Coastal, but for which Coastal had never paid Browning in the first place. Plaintiffs urged that theory even though (1) the delay in returning the inventory was short and Browning promptly returned the inventory after being ordered to do so by the bankruptcy court (18-V56:189-93); (2) while Plaintiffs asserted that the value of the Browning inventory in question was about $1.6 million, Plaintiffs admitted that Coastal had about *$13.4 million* worth of other inventory available for sale (18-V57:140-42); (3) Coastal was on the verge of bankruptcy before any of Browning's allegedly wrongful conduct occurred (*supra* at 3-4); and (4) Coastal declared bankruptcy before Browning even had any duty to have completed the return of the inventory to Coastal (18-V54:30-33, 44-45; PX-37; 18-V55:93).

The evidence on which Plaintiffs rely to try to prove their causation theory is exactly the kind of evidence that has been condemned as inadequate to establish causation under Texas law. In *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995), the Texas Supreme

Court recognized that unsubstantiated, conclusory, and speculative opinions of a party – such as the opinions offered in this case – cannot prove causation as a matter of law. Just as the plaintiffs in *Haynes & Boone* could not recover because they failed to prove that the languishing shopping center involved in that case would have survived anyway, Plaintiffs in this case cannot recover because they failed to prove that the desperately troubled Coastal would have survived. *Id.* Any connection between Browning's brief delay in returning the inventory and Coastal's bankruptcy is simply too attenuated to provide a basis for liability under Texas law. *See Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 776 (Tex. 1995).

Nor did Plaintiffs establish causation through testimony of their expert that, if Coastal's proposed workout plan had been implemented, Coastal would have had a good chance of succeeding. 18-V56:69, 91. It is undisputed that the plan by its terms "required 100-percent participation" by all creditors, but that numerous creditors had decided not to participate. 18-V57:198-99, 129-33; 18-V53:129-31; DX-282, DX-313, DX-314. Plaintiffs' expert admitted that he was unaware that a significant number of Coastal's creditors had rejected Coastal's workout plan. 18-V56:136-37. Because the expert's opinion was based on the successful implementation of Coastal's plan, and since that plan could not have been implemented because it was not accepted by all Coastal's creditors, the expert's opinion had no probative value. Under Texas law, when "an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or a judgment." *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995).

Since the district court's judgment would have had to be reversed based on the absence of legally sufficient causation evidence (as well as numerous other errors)

regardless of the Fifth Circuit's judicial estoppel ruling, certiorari should be denied in this case.

CONCLUSION

For the foregoing reasons, Browning respectfully requests that the petition be denied.

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